IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 302 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MUKESH K MEHTA

Versus

VINODKUMAR AGRAWAL

Appearance:

1. Civil Revision Application No. 302 of 2002

MR BHARAT R PANDYA for Petitioner No. 1

MR JT TRIVEDI for Respondent No. 1

MR BJ TRIVEDI for Respondent No. 1

MR SH LIGHTWALA for Respondent No. 1

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 19/12/2002

ORAL JUDGEMENT

#. The petitioner herein instituted the civil suit, being Summary Civil Suit No.5529 of 1999. The said suit was filed for recovering of Rs.5,76,243=97 from the respondent herein. The respondent appeared in the said suit by filing his appearance through his advocate. Thereafter, on behalf of the plaintiff, summons for judgment was taken out, which was served upon the respondent. The defendant, thereafter, served the copy of the leave to defend affidavit to the advocate of the plaintiff and rejoinder was also filed by the plaintiff. Thereafter, it seems that the matter was placed on board of the Chamber Court for hearing the application for summons for judgment. It seems that the advocate of the defendant did not appear during the hearing and ultimately, on 30.11.2000 the Court gave last opportunity to the defendant to place on record the appropriate affidavit regarding leave to defend. Since the defendant failed to appear, ultimately, the suit was decreed on 22.12.2000. Subsequently, the present petitioner on the basis of the said decree, filed the execution petition, being Execution Petition No.628 of 2001, in which, Jangam Warrant was already issued by the trial Court. At that stage, the present respondent judgment debtor deposited about Rs.25000/- and gave certain post dated cheques for the balance amount and subsequently, the present respondent submitted an application, being Civil Misc. Application No.61 of 2002 under Order 37, Rule 4 of the Civil Procedure Code for setting aside ex parte decree.

#. The trial Court, after considering the facts and circumstances of the case, came to the conclusion that, there are special circumstances exist for allowing the application under Order 37, Rule 4 of the Code. The learned trial Judge has already described the said special circumstances in the judgment to the effect that, even though the vakilatnama has been filed by the original defendant and the same has also been tendered in the Court on 26.4.2000, but the said appearance purshis and the vakilatnama had not been reflected / incorporated in the rojkam of the said case on 26.4.2000. Likewise, summons for judgment has been filed on 26.4.2000 by the learned advocate for the original plaintiff, but the same has been reflected in the proceedings-sheet of Summary Suit No.5529 of 1999. Relevant part of the observations of the trial Judge in this connection are as under.:

> "It is pertinent to note that as referred the above the rojkam of dt.7.12.1999 and 7.3.2000 the concerned official had not put his initial below it. Referring the record and proceedings sheets of Summary Civil Suit No.5529/1999 it appears

> that on 26.4.2000 appearance and vakalatnama had been filed by the applicant/ori. defendant and the same had also been tendered in the court on 26.4.2000 but the said appearance purshis and vakalatnama had been reflected/incorporated in the proceedings sheets of the said case on 26.4.2000 likewise the summons for judgment had been filed on 28.6.2000 by the learned advocate for the opponent/ori. plaintiff but the same had been reflected in the proceedings sheets of rojkam dated 9.10.2000 of Summary Civil Suit No.5529/1999. As per the case of the opponent/ori. plaintiff on 23.11.2000 his learned advocate had filed purshis drawing attention of the Court that the learned advocate for the applicant/ori. defendant had served upon copy of leave to defend affidavit on 29.6.2000 in Summary Civil Suit No.5529/1999. Referring the record the said purshis dated 23.11.2000 is on the record but referring the proceedings sheets of Summary Civil Suit No.5529/1999 it appears that same had not been reflected/incorporated in it by Court official and thus it appears that the care and caution which is required to be taken by the Court official had not at all been taken while carrying out the said rojkam is the submission made by the learned advocate for the applicant/ori. defendant and there appears substance in it."

#. Considering the record of the case, ultimately, the trial Court was of the opinion that, it is a fit case for allowing the application, and, accordingly the order passed in Summary Suit No.5529 of 1999 is set aside by the learned trial Judge and the applicant - defendant was permitted to file fresh leave to defend application. The trial Judge has ordered that, summary suit to be proceeded further in accordance with law. Accordingly, the trial Court dismissed the execution petition. The aforesaid order of the trial Court is impugned at the instance of the original plaintiff in this revision application.

#. At the time of hearing of this revision application, Mr.Pandya, learned advocate, very vehemently argued that, even though the defendant was aware about the said decree since long, he never bothered to prefer such application within reasonable period. He further submitted that, even the advocate of the defendant was aware about such proceedings prevailing at the relevant time as well as he was aware of the order of passing the decree, but the

defendant has not taken any steps by preferring such application. Instead, the defendant agreed to pay entire dues at the time of execution proceedings. He, therefore, submitted that, the trial Court has committed error in allowing the application submitted by the defendant by setting aside the aforesaid decree. Mr.Pandya, more or less, relied upon the aspect about information available with the advocate of the petitioner about such ex parte decree as well as the conduct of the defendant in paying some amount towards decretal award and giving certain cheques towards the said decree.

#. Mr.J.T.Trivedi, learned advocate, appearing for the respondent, submitted that the trial Court has considered the rojkam, and, ultimately, after considering the facts and circumstances of the case, has rightly came to the conclusion that ex parte decree is required to be set aside. He further submitted that, if there is an error on the part of the officer of the Court, the party is not required to suffer. He submitted that, in any case, this is not a case, in which, it can be said that the trial Court has committed any error of jurisdiction in passing the impugned order and, accordingly, in his submission, this Court cannot exercise its limited jurisdiction under Section 115 of the Civil Procedure Code, as, according to him, it cannot be said that the trial Court has committed any error of jurisdiction in passing the impugned order. He further submitted that, even otherwise, substantial justice is done to the defendant, as, ultimately, he is permitted by the trial Court to put forward his case before the trial Court. Mr.Trivedi, has also relied upon the judgment of this Court passed in Special Civil Application No.9074 of 2002 dated 24.9.2002. In the aforesaid judgment, this Court (Coram : R.K.Abichandani,J) has observed in para 3 as under :

> "The learned Trial Judge, on the basis of the material on record, took note of the fact that Satish Modak, through whom the defendant was to be served, was suffering from severe mental stress and anxiety associated with high fever due to viral infection since 25th December, 2001 and was advised to take rest upto 23rd January, 2002. On this basis, the Trial Court hold that the defendant had succeeded in proving that there were special circumstances made out by the defendant which prevented the defendant from filing appearance in the suit. The suit was accordingly ordered to be restored. The Trial Court has exercised its discretion for cogent reasons for setting aside the decree and

restoring the suit and has not committed any error in exercise of its jurisdiction in making the impugned order. The petition, is, therefore, summarily rejected."

#. After hearing the both the sides as well as after going through the order of the trial Court, in my view, this is not a case, in which, this Court is required to set aside the order of the trial Court in its limited jurisdiction under Section 115 of the Civil Procedure Code. The trial Court has given cogent reasons while coming to the conclusion that, a special case is made out by the defendant for setting aside ex parte decree. It cannot be said that the order of the trial court suffers from any jurisdictional error. Even on merits, in my view, reasons given by the trial Court are absolutely just and proper. As submitted by Mr.Trivedi that, at the time of execution when the bailiff came with Jangam warrant, naturally, the defendant was shocked and under the compulsion, he had no option, but to hand-over certain cheques as well as Rs.25000/- in cash, but according to him, that itself would not take away his right to apply to the trial Court under Order 37 Rule 4 of the Civil Procedure Code.

#. Considering the facts and circumstances of the case, in my view, therefore, there is absolutely no justification in this revision application and the same is accordingly deserves to be dismissed and is accordingly dismissed. Rule is discharged with no order as to costs. Ad-interim relief granted earlier stands vacated. The trial Court shall proceed with the aforesaid Summary Suit from the stage of filing the leave to defend. The trial Court has already permitted the defendant to file fresh leave to defend application, copy of which is furnished before the trial Court at mark 3/2. However, it will be open for the defendant to apply to the trial Court permitting him to file a fresh leave to defend application. The defendant may file such leave to defend application on or before 31.1.2003. Writ to be sent to the trial Court forthwith. Direct service of the writ of this order is permitted to the respondent.

(P.B.Majmudar,J)
(pathan)